

EA7LFERS

Sentence

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 UNITED STATES OF AMERICA,

4 v.

10 CR 863 (AKH)

5 JOE FERNANDEZ,

6 Defendant.

7 -----x

8 New York, N.Y.
9 October 7, 2014
11:15 a.m.

10 Before:

11 HON. ALVIN K. HELLERSTEIN,

12 District Judge

13
14 APPEARANCES

15 PREET BHARARA

United States Attorney for the
Southern District of New York

16 TODD BLANCHE

17 RUSSELL CAPONE

Assistant United States Attorneys

18 FOX ROTHSCHILD LLP

Attorneys for Defendant

19 BY: ROBERT W. RAY

20 ALSO PRESENT: JOHN BARRY, Criminal Investigator

EA7LFERS

Sentence

1 (Case called)

2 THE COURT: We'll hear the motion first made by
3 Mr. Ray, and depending on the outcome, we're going to decide
4 what comes next. So, Mr. Ray, please.

5 MR. RAY: Yes, your Honor.

6 To keep things relatively simple, Patrick Darge
7 testified at trial that he committed murder and in that regard
8 he implicated two people: Luis Rivera as the driver of the
9 getaway vehicle, and my client as the second shooter.

10 After much effort since my appointment now almost a
11 year ago, I have come to learn and confirmed that Luis Rivera
12 told the government that he was not the driver of the getaway
13 vehicle, that he consistently maintained that to the
14 government. I have reason to believe, although I don't know
15 for certain since I don't have access to the information, that
16 he told the government that prior to trial of this case. And
17 that information was never disclosed to the defense.

18 My view is -- and I don't think I'm incorrect, but the
19 government can perhaps shed light on it -- that that
20 information, at least in my judgment, was Giglio material as to
21 the testimony of Patrick Darge, which makes it Brady material.

22 The government's position seems to be although for the
23 longest time --

24 THE COURT: Can you embellish that point? Why is it
25 Giglio material in regard to the testimony of Darge?

EA7LFERS

Sentence

1 MR. RAY: Because Darge makes very apparent, as I
2 indicated in my motion, that he did it and that, as he
3 testified, two people came readily to mind, Luis Rivera as the
4 getaway driver and my client as the second shooter.

5 THE COURT: Supposing --

6 MR. RAY: If I could just draw it out, your Honor. If
7 he's lying about the one, which is that Luis Rivera --

8 THE COURT: Let me focus the question.

9 MR. RAY: Sure.

10 THE COURT: Take it away from the protagonist here,
11 let's just say X. X is a government witness, someone who had
12 been turned, let us say. And he says B was the getaway driver.
13 B denies that. In the testimony of X is B's denial Giglio
14 material? Are there cases on that point?

15 MR. RAY: It would seem to me clear that that's
16 information that tends to impeach the testimony of that
17 witness.

18 THE COURT: I'm not sure. It may; it may not. I
19 wonder if there's any law on that particular point.

20 MR. RAY: I think it's a separate question as to
21 whether or not you may be able to get that information into
22 evidence, but it seems to me it would be proper
23 cross-examination to confront in your example witness --

24 THE COURT: That someone else you identified denies
25 it.

EA7LFERS

Sentence

1 MR. RAY: Yes. You may have to take the answer, but I
2 think you're entitled to ask the question.

3 THE COURT: That's a separate issue. The question is
4 whether the government -- say the government has possession of
5 a denial by someone identified in that fashion, is that Brady
6 material that the government is required to turn over? I don't
7 know the answer. I'm asking you.

8 MR. RAY: Well, the government --

9 THE COURT: That's basic to your motion.

10 MR. RAY: Well, I think, but it's a simple question,
11 is it impeachment material of the witness on the stand and the
12 answer is yes. It tends to show that the witness may not be
13 telling the truth.

14 THE COURT: Is every bit of potential impeachment
15 information Brady material?

16 MR. RAY: Well, I think there's a fair and clear line
17 that the failure to turn over Giglio material is a Brady
18 violation. It is a subset of Brady.

19 THE COURT: Is it a requirement under Giglio? I don't
20 know. Are there any cases that you can cite to me? That's how
21 a district court knows -- some case precedent says it's so. I
22 could reason to say or you could reason. I'm asking are there
23 any cases?

24 MR. RAY: Well, I'm sure there are cases. Bagley is
25 one of them, Brady itself. The question is whether it tends to

EA7LFERS

Sentence

1 exculpate the accused.

2 THE COURT: I don't know that it does. Someone else
3 denies it -- it must be very common in criminal law
4 prosecutions that someone identifies, says I didn't do it.

5 MR. RAY: Well, I think that --

6 THE COURT: I don't know that it says anything about
7 Darge's credibility or not. Darge could say that Rivera was
8 the getaway driver and Rivera could say I wasn't. That's a
9 common occurrence.

10 MR. RAY: Yes, but it's material, your Honor. I mean
11 the point is it's not just any inconsistent statement. The
12 point is there's someone else who is directly supposedly
13 involved by Patrick Darge's testimony who is saying I wasn't
14 there.

15 THE COURT: So the bottom line is you don't have any
16 cases.

17 MR. RAY: No. Well --

18 THE COURT: You have cases in general what Giglio
19 requires and in general what Brady requires, but you don't have
20 a specific case having to do with whether or not the government
21 is obligated to turn over a denial by some third person. Okay.
22 There may not be such case, Mr. Ray. I'm not faulting you.

23 MR. RAY: I think if that's the question, I think I
24 can find cases that are relevant to that point.

25 THE COURT: Yeah, well, that's what you should have

EA7LFERS

Sentence

1 done before you made the motion.

2 MR. RAY: Part of my problem is I don't have an answer
3 from the government as to whether or not even the information
4 exists to begin with. What I do know now which I didn't know
5 until recently is I have Luis Rivera through an investigator
6 who was hired by the family confirm his position that he was
7 not there and, further, that he told the government from the
8 outset that he was not there.

9 THE COURT: And whether he did that and whether it's
10 true or not, nobody knows. Mr. Rivera has every incentive to
11 say what you say he said. He's a cousin, he's implicated, and
12 it's a very serious case. I think I have your point.

13 MR. RAY: So does Patrick Darge. And the question is
14 if Patrick Darge is not telling the truth as to Luis Rivera,
15 how is he telling the truth as to Joe Fernandez. That seems to
16 me to be material to the question as to the truthfulness of
17 Darge's testimony.

18 THE COURT: I have your point.

19 MR. RAY: The second issue with regard to the motion
20 was based upon information that was discovered that suggests
21 based upon the phone records that were presented as exhibits to
22 the memorandum of law in support of the motion that records
23 that we now have from the family relative to Mr. Fernandez's
24 cell phone in use at the time do not match the records that
25 were submitted admittedly by stipulation at trial from

EA7LFERS

Sentence

1 Christian Guzman who testified briefly, although significantly,
2 that those were calls in anticipation of a meeting that he
3 observed occur although did not overhear between Alan Darge and
4 Mr. Fernandez.

5 THE COURT: These telephone records are corroborative
6 information --

7 MR. RAY: Yes.

8 THE COURT: -- that what Darge said took place in
9 conversations between him and Fernandez at the home of
10 Christian Guzman.

11 MR. RAY: Yes.

12 THE COURT: And the point of the telephone records is
13 to show that there was an actual telephone call between Guzman
14 and Fernandez before the meeting.

15 MR. RAY: On that date in question, yes.

16 THE COURT: And the AT&T records seem to corroborate
17 that. The Verizon records don't match.

18 MR. RAY: Correct, and they should.

19 THE COURT: And you're arguing to me that one wonders
20 why the same phone would be both a Verizon servicer and an AT&T
21 servicer.

22 MR. RAY: No. So it's clear, Mr. Fernandez's phone
23 was a Verizon Wireless cell phone. The records that were
24 introduced were from AT&T and they were Mr. Guzman's phone.
25 And the records from Guzman's phone introduced at trial

EA7LFERS

Sentence

1 purportedly showed calls to Mr. Fernandez's phone on that date.

2 THE COURT: And so if the Verizon records don't
3 indicate it but the AT&T records do indicate it, what would
4 have been the point of the examination?

5 MR. RAY: The point of the examination was to show
6 conclusively one way or another, which I think we can only
7 answer by subpoena relative to the respective records from
8 Verizon and AT&T, as to whether the records that were
9 introduced at trial are accurate or they're not accurate.

10 THE COURT: Well, you've stipulated their accuracy.

11 MR. RAY: Well, we stipulated based upon information
12 that seemed to be available at the time that they came by
13 virtue of a subpoena from the relevant phone which was
14 Christian Guzman. Nobody had reason --

15 THE COURT: This is Fernandez's own phone.

16 MR. RAY: Correct.

17 THE COURT: So there's no reason why that couldn't
18 have been done in preparation for the trial.

19 MR. RAY: Well, I wasn't trial counsel, so I don't
20 know.

21 THE COURT: It doesn't make any difference. You had a
22 really good trial counsel.

23 MR. RAY: All right. But, you know, there wasn't any
24 reason at that time to believe that there was a discrepancy and
25 now there is reason to believe that there's a discrepancy

EA7LFERS

Sentence

1 because the records don't match and they should.

2 THE COURT: The evidence that's supposed to be newly
3 discovered was always available to you. You meaning
4 Mr. Fernandez and his counsel.

5 MR. RAY: Theoretically, what was available was the
6 ability to subpoena Verizon Wireless to find out what those
7 records demonstrated.

8 THE COURT: Which you had.

9 MR. RAY: Well, you always have the ability to
10 subpoena that. What you didn't have was any reason to believe
11 that those records were anything but what they purported to be.

12 THE COURT: Why would they be doubting now? Nothing
13 you produced doubts it. These are the AT&T records.

14 MR. RAY: What I've produced is something that should
15 match and doesn't.

16 THE COURT: Mr. Ray, in preparation for trial, you
17 know the government has got the burden.

18 MR. RAY: Yes.

19 THE COURT: And defense can do anything it wants to
20 counter that burden. This is evidence that was available to
21 you and we have a stipulation. What you want me to do now is
22 to relieve you of the stipulation. Your motion really now
23 posttrial is to ask for leave to withdraw from that stipulation
24 during trial.

25 MR. RAY: No.

EA7LFERS

Sentence

1 THE COURT: Had that motion been made at the time, it
2 may have been granted and the government would have been put to
3 its proof. They could have called someone from AT&T and said
4 are you the custodian? They would have said yes. They would
5 have said are these records made in the regular course of
6 business contemporaneously with the telephone calls? The
7 answer would be yes. And those were the records. Nobody is
8 charging that the government doctored those records.

9 MR. RAY: I have no way of knowing. I'm not accusing
10 anybody of anything. All I'm saying is I have records that
11 should match and don't. I'm asking for the issuance of a
12 subpoena to find out one way or another, and then we'll figure
13 out where we are. Right now I think I have a reasonable good
14 faith basis to ask, as I directed the question initially to the
15 government if it would do so voluntarily and they refused.
16 Their answer was we have no reason to question the veracity or
17 integrity of our records. All I'm saying is they should match
18 and why don't they? I'm asking a reasonable question. And the
19 only way to answer that question is to issue a subpoena for the
20 two respective cell phone carriers to find out whether the
21 records are what they purport to be or not.

22 THE COURT: You attached the Verizon records.

23 MR. RAY: I did. I also attached as part of an
24 exhibit to the motion the relevant page from the AT&T records
25 that were admitted at trial by way of that stipulation.

EA7LFERS

Sentence

1 THE COURT: At trial by stipulation we have evidence
2 of a telephone call made on Guzman's phone to Fernandez's
3 phone.

4 MR. RAY: I think there were four, but, yes, four
5 calls.

6 THE COURT: Before the meeting.

7 MR. RAY: Correct.

8 THE COURT: Okay. Anything else?

9 MR. RAY: And just so the record is clear, the reason
10 that that's important, I understand they're just cell phone
11 records, but that was an important piece of corroboration. I'm
12 just asking I think on a good faith basis the legitimate
13 question, with a good faith basis to do so, whether those
14 records are in fact really what they purport to be. In the
15 ordinary case, that's never a question.

16 THE COURT: You've made a Rule 33 motion --

17 MR. RAY: Yes.

18 THE COURT: -- which challenges the sufficiency of the
19 record. The record in this respect is sufficient except by
20 your admission because on its face there's nothing wrong with
21 it. You're saying that I should look into something outside
22 the record to impeach the record.

23 MR. RAY: Well, presently outside the record, but yes.

24 THE COURT: Isn't that something that comes up under
25 2254 and not under Rule 33? Rule 33 doesn't require me to go

EA7LFERS

Sentence

1 outside the record. Trial has been had, it's been finished,
2 it's closed. And Rule 33 is a challenge to the sufficiency of
3 the record. That's what it is.

4 MR. RAY: Rule 33(b) is with regard to --

5 THE COURT: -- newly discovered evidence.

6 MR. RAY: Your Honor is making the point, I think,
7 that that's not really newly discovered. What is newly
8 discovered is the fact that there's a record that should match
9 what was introduced at trial that doesn't.

10 THE COURT: I understand something is newly discovered
11 that was discoverable before the trial. That's what you're
12 saying, and I'm not sure Rule 33(b) encompasses that.

13 Okay. Let me hear from the government.

14 MR. BLANCHE: Good morning, your Honor.

15 On the Rule 33 issue, just quickly, the case cited by
16 the government, United States v. Owen, applies, is directly
17 applicable to this case.

18 THE COURT: Owen, right?

19 MR. BLANCHE: Owen, O-W-E-N, 500 F.3d 83.

20 What the defense is saying is that, arguably, is that
21 Mr. Fernandez didn't call Christian Guzman back in 2011. And
22 their evidence of that is even though there was testimony at
23 trial from AT&T admitted via stipulation, they now have records
24 that are not official business records -- it's a portion of a
25 telephone bill -- that doesn't show the phone calls.

EA7LFERS

Sentence

1 THE COURT: I'm going to assume it's an extract of
2 something that is an official business record because I have to
3 take what Mr. Ray gives me as the fact. So you're saying that
4 this is not newly discovered because it was discoverable under
5 Owen.

6 MR. BLANCHE: Absolutely. Especially because in this
7 case --

8 THE COURT: That's the whole point.

9 MR. BLANCHE: That's the whole first part of the point
10 because if anybody would have known whether he called
11 Mr. Guzman that day, putting aside the records, it's
12 Mr. Fernandez. And so the fact that supposedly he didn't call
13 him, which is really what the point of this motion is, he would
14 have known that and could have said and I'm sure would have
15 said to his counsel, I don't care what those AT&T records show,
16 I didn't call that guy, I wasn't there, let's fix it. He
17 didn't say that. It's not surprising that there was a
18 stipulation. They were straightforward AT&T phone records. So
19 that is the first point.

20 But the second and equally as significant point is
21 that this is directly against Owen in that it's not --

22 THE COURT: What did Guzman testify? Did he testify
23 he made the call?

24 MR. BLANCHE: I believe he testified that he received
25 the calls from Mr. Fernandez and then he came over shortly

EA7LFERS

Sentence

1 thereafter.

2 This evidence would not have resulted in acquittal,
3 and it really is just impeachment. Even defense admits that.
4 And Owen says it's not enough to get a new trial if the newly
5 discovered evidence is simply impeachment. Here, best case
6 scenario for defense counsel, he could have said to Christian
7 Guzman and Alan Darge, well, do you know that there's records
8 out there that don't show phone calls? Their answer would have
9 been yes, no, whatever it would be; but it would just be to
10 impeach their testimony that indeed Mr. Fernandez was at that
11 apartment on that day.

12 THE COURT: Guzman testifies Fernandez called him
13 before the meeting. And what then?

14 MR. BLANCHE: And then he says that Mr. Fernandez came
15 over and that Alan Darge was there and that he saw Alan Darge
16 and Mr. Fernandez talking off in the corner. He doesn't know
17 what they were talking about.

18 THE COURT: So you have Guzman's testimony that they
19 were there together. You have the preexisting telephone calls
20 arranging for the meeting.

21 MR. BLANCHE: And you have Alan Darge saying he was
22 there with him, right.

23 THE COURT: And you have a record to back it up.

24 MR. BLANCHE: A business record, absolutely.

25 THE COURT: And now there's another record supposedly

EA7LFERS

Sentence

1 that doesn't show it and would be expected to show it. It
2 doesn't seem to me that it is of a material nature that is
3 required to change the course of the verdict, and I think
4 that's what Owen holds.

5 MR. BLANCHE: That's exactly what Owen holds.

6 THE COURT: Let's go with the first point.

7 MR. BLANCHE: Yes, your Honor. On the first point,
8 the government does not have Brady. I am not sure because I
9 haven't seen any affidavit or report what Luis Rivera has told
10 an investigator. I have no idea.

11 THE COURT: That doesn't help me too much because if
12 there is such information and if it exists anywhere, if it
13 existed anywhere in the government, you had the obligation to
14 produce it.

15 MR. BLANCHE: Of course.

16 THE COURT: Brady requires it. So the fact that you
17 don't know personally is of no moment.

18 MR. BLANCHE: Judge, that's not what I was saying.
19 Mr. Ray just said that the family hired a private investigator
20 who has talked to Mr. Rivera. My point is I have no idea what
21 Mr. Rivera said to the private investigator hired by the
22 family. I have no idea.

23 I do know what Mr. Rivera through his counsel and what
24 Mr. Rivera said to us. It's not Brady and it's not consistent
25 with what apparently he has told an investigator. And that's

EA7LFERS

Sentence

1 really all that in the government's view and our obligations,
2 of course we take this seriously. We did turn over Brady and
3 this information --

4 THE COURT: Mr. Ray wants me to read what those
5 interview notes were.

6 MR. BLANCHE: Pardon me?

7 THE COURT: Mr. Ray wants me to read what those
8 interview notes were.

9 MR. BLANCHE: Correct.

10 THE COURT: And to draw my own conclusion whether it
11 was Brady or not after I read it. Do you have any objection to
12 that?

13 MR. BLANCHE: Yes. We don't think it's appropriate.
14 We don't think there's any basis in law for that. And it's
15 just if the Court were required to in camera review all
16 interview notes --

17 THE COURT: I'm not asking for all.

18 MR. BLANCHE: -- all interview notes related to
19 Mr. Rivera --

20 THE COURT: As a practical matter, it would resolve
21 the issue. It would remove it from the theoretical to the
22 actual. If I were to read it and then conclude from it that
23 there's no basis to believe what Mr. Ray surmises, then the
24 issue is over.

25 MR. BLANCHE: That's true. However, your Honor, it

EA7LFERS

Sentence

1 doesn't -- yes, of course that's true that your Honor could
2 review the notes and reach a conclusion. However, even if your
3 Honor said, look, government, I think you should give this to
4 Mr. Ray, it really doesn't get us anywhere because
5 Mr. Rivera --

6 THE COURT: That may be true. That also may be true.
7 But as a practical matter, it would moot the point Mr. Ray
8 makes.

9 MR. BLANCHE: Judge, it would, but that's always the
10 case in a situation like this. I'm not disagreeing with you
11 and I'm not trying to be flip about it.

12 THE COURT: Bottom line, for whatever reason, you
13 don't want to produce it to me.

14 MR. BLANCHE: I don't think that's a fair
15 characterization, Judge. The government doesn't have a problem
16 giving it to you. It's not like, your Honor, I don't trust
17 your Honor or something like that. I'm saying the law doesn't
18 require it.

19 THE COURT: I think you may be right. As a practical
20 person, I'm looking for a practical resolution.

21 MR. BLANCHE: And fair enough. That's a fair point.

22 THE COURT: As a lawyer for 38 years and as a judge
23 for almost 16, I've learned to search for the practical
24 solution to a problem. That doesn't mean that the law requires
25 the path I propose. And you could say, and I wouldn't

EA7LFERS

Sentence

1 criticize you for saying it, with respect, Judge, we're not
2 producing it because the law doesn't require us to produce it.
3 If that's your position, that's your position. I just wanted
4 to know what is your position.

5 MR. BLANCHE: So the government's position is your
6 Honor is correct. Practically, that's something that could be
7 done. The government's very strong position though is that
8 it's not necessary and sentencing should proceed. This trial
9 happened a year and a half ago.

10 THE COURT: Don't put it into different words,
11 Mr. Blanche. You can say I respectfully decline to produce it.

12 MR. BLANCHE: Fair enough.

13 THE COURT: I'm pushing you not to use ambiguous
14 words. Yes or no.

15 MR. BLANCHE: No, the government does not want to
16 produce the record, the notes, to the extent they exist, of
17 either Mr. Rivera -- defense counsel has also asked for other
18 witnesses as well -- Mr. Suero, any notes we have of Mr. Suero.

19 THE COURT: That's the two witnesses, Suero and Luis
20 Rivera.

21 MR. BLANCHE: Correct. And I think the request was
22 also made for your Honor to review the homicide file in camera,
23 which the government also objects to having your Honor do.

24 THE COURT: That's a vague reference, the homicide
25 file. They asked me to review the whole basis for the case.

EA7LFERS

Sentence

1 I'm narrowing to two specifics, actually, to one specific
2 because Mr. Ray based his entire argument on Rivera. He said
3 Suero also in his papers, but I think he would be satisfied if
4 I looked at what you have in 3500 material for Rivera. Rivera
5 was not a witness because we understood that he would claim the
6 Fifth Amendment as a privilege and there was no point to
7 calling him by either side.

8 MR. BLANCHE: Right. And it's not 3500 material.
9 It's just notes from an interview.

10 THE COURT: You made an argument before and I'm
11 frankly not sure I can use it, the fact that Mr. Fernandez had
12 the ability to say I was at the meeting or I wasn't at the
13 meeting, I made the call, I didn't make the call; and he was
14 silent about that. He has a right to be silent.

15 MR. BLANCHE: No, Judge. But under Owen, the defense
16 has to show that they didn't know about the new evidence at the
17 time of trial and exercised due diligence.

18 THE COURT: So your point is they had to know because
19 if he knows he didn't make the call and a record shows he did
20 make the call, that would have been --

21 MR. BLANCHE: Exactly. So he can't overcome the first
22 two points because he had to know he didn't make the call.

23 THE COURT: What do you say to that, Mr. Ray?

24 MR. RAY: Well, I don't know that I'm obligated to say
25 this and I think your Honor hit the right point regarding --

EA7LFERS

Sentence

1 THE COURT: You're not obligated to say it, but it
2 goes --

3 MR. RAY: Let me try to be helpful, please.

4 THE COURT: Let me rephrase it so we can focus it. I
5 do not understand what Mr. Blanche said as urging some change
6 in the obligation of a witness to testify when he clearly has a
7 right not to testify.

8 MR. RAY: And he did not testify, correct.

9 THE COURT: And he did not testify. What he's saying
10 is that this is relevant to the issue of newly discovered
11 because Mr. Fernandez and his counsel knew whether or not the
12 call was or was not a fact. And if it wasn't a fact and
13 records were immediately available to show that, you could
14 expect the defendant to subpoena the records that would show
15 that; and the fact that he didn't goes to whether or not it is
16 newly discovered materials under Rule 33(b).

17 Do I state the point well, Mr. Blanche?

18 MR. BLANCHE: That's correct.

19 MR. RAY: It is relevant as to whether it's newly
20 discovered and to the question of diligence, but let me just
21 suggest to your Honor first, without any obligation to do so,
22 my client's position in that regard is somewhat difficult
23 because he's not saying he doesn't know Christian Guzman.

24 THE COURT: They were cousins.

25 MR. RAY: Right. And he is also not saying he would

EA7LFERS

Sentence

1 have had an occasion to have contacted Mr. Guzman by cell
2 phone. So it's not like, you know, oh, let's challenge the
3 records because my client's position, he doesn't know the man
4 so there's no way there could be a cell phone record that
5 suggests that he does, right.

6 What we are saying is presuming things in the ordinary
7 course and having records produced by government subpoena as to
8 what AT&T shows carries with it I think a presumption of
9 regularity and it's not offset by any ability on a diligence
10 factor that my client's position is and would have been
11 reasonably at the time, well, that can't be, I don't even know
12 the guy and I wouldn't have ever made the phone call to this
13 guy. So I don't know what you got to do, but those AT&T
14 records are just wrong. Go get a subpoena and find out that
15 I'm telling the truth because I am telling you I never talked
16 to this person ever in my whole life. Don't have his number,
17 don't know who he is, didn't talk to him. That's not his
18 position.

19 THE COURT: Okay. I think we've canvassed the point.

20 Let's go back to the point of Brady and Giglio.

21 Mr. Fernandez made a motion when you were standby counsel --

22 MR. RAY: Yes.

23 THE COURT: -- for a new trial --

24 MR. RAY: Yes.

25 THE COURT: -- on the basis that the government

EA7LFERS

Sentence

1 violated Brady, and I denied that motion.

2 MR. RAY: Yes.

3 THE COURT: Aren't you in effect covering the same
4 grounds now as were well covered by Mr. Fernandez with your
5 help as standby counsel before?

6 MR. RAY: Well, I think it's fair to say partially to
7 your Honor's question, yes, we're covering the same ground, but
8 we're covering that territory based upon something that we
9 didn't know when he filed his motion.

10 THE COURT: Namely, that Rivera was interviewed by
11 your private interviewer and your private interviewer told you
12 that Rivera denied being the getaway driver.

13 MR. RAY: Correct. My understanding, and I wasn't
14 there, but Mr. Richman had received -- it's not like we didn't
15 know Luis Rivera was out there because, obviously, he was a
16 defendant in the case. But the information that was sought and
17 obtained was the following, that is, that Luis Rivera -- the
18 information was that Luis Rivera doesn't know Mr. Fernandez.
19 And we were aware, of course, of the fact that there were
20 negotiations leading towards a disposition. I don't recall
21 whether that disposition took place before the trial or not. I
22 think it did.

23 THE COURT: That sounds a little different from what
24 you said before.

25 MR. RAY: I'm talking about what was known by

EA7LFERS

Sentence

1 Mr. Richman at the time.

2 Now, what was learned that was new is that it wasn't
3 that he doesn't know Mr. Fernandez. What was new and what
4 Mr. Fernandez didn't know until frankly yesterday because I
5 didn't know it until yesterday is that what happened was that
6 Mr. Rivera went into the U.S. Attorney's Office and told the
7 government, which I think Mr. Blanche has confirmed at least
8 implicitly there are notes to suggest this, that he was not the
9 driver and therefore was not there, period.

10 THE COURT: I don't know if that's true or not.

11 MR. BLANCHE: That's not true.

12 THE COURT: What is your representation, Mr. Blanche?

13 MR. RAY: My representation?

14 THE COURT: Mr. Blanche. What's the government's
15 representation?

16 MR. BLANCHE: The representation as to what Mr. Rivera
17 said when he met with the government?

18 THE COURT: What's your representation to me in your
19 argument to the Court.

20 MR. BLANCHE: The government's representation is that
21 to the extent Mr. Rivera or through his counsel communicated
22 with the government about Mr. Rivera's position towards
23 cooperation, meaning whether he wanted to be a cooperator and
24 be a witness at trial, nothing that he said either from his
25 lips or from his counsel's lips is Brady. What he said and

EA7LFERS

Sentence

1 what his counsel said to us is different than what he has
2 apparently recently told an investigator.

3 THE COURT: But you don't know what he told the
4 investigator. You can't say that.

5 MR. BLANCHE: He didn't say that to the government and
6 that's why when we said we don't have any Brady, that's what we
7 mean.

8 THE COURT: Is it your representation that you've
9 reviewed all the materials in response to Mr. Ray's renewed
10 request for all Brady material and that you feel that
11 everything you were obliged to produce you have produced and
12 there's nothing more in your files that you were obligated to
13 produce?

14 MR. BLANCHE: Yes.

15 THE COURT: That's your representation.

16 MR. BLANCHE: Yes.

17 THE COURT: Okay. Thank you.

18 MR. RAY: And, your Honor, that's a fair
19 representation. But I've spent a year trying to just extract
20 whether Suero and/or Rivera made any statements whatsoever and
21 have only recently got a representation from the government
22 that while there may have been statements, they didn't say
23 anything that we believe is Brady material that we were
24 obligated to disclose.

25 THE COURT: That's a customary response in all cases.

EA7LFERS

Sentence

1 MR. RAY: I know. All I'm saying is I would like to
2 take your Honor up at least on the hope that your Honor would
3 arrive at a practical solution.

4 THE COURT: Mr. Ray, I'm following through on what you
5 suggested.

6 MR. RAY: I know you are.

7 THE COURT: Don't put anything to me.

8 MR. RAY: I would ask your Honor --

9 THE COURT: You're a very good lawyer and you made a
10 suggestion and I pursued it.

11 MR. RAY: I would like that suggestion to just be
12 pursued. I hear the point that the request for the homicide
13 file --

14 THE COURT: I'm not going to rule.

15 MR. RAY: -- is too broad. And you heard me correctly
16 that I didn't mention Suero. I'm asking I think now for
17 something very little to just see whether there's anything --
18 look, this man's life is on the line. It's going to be a
19 mandatory life sentence.

20 All I'm asking based upon what I've spent a year
21 trying to figure out is whether -- and I don't know. I wasn't
22 there at the scene of the crime, and I didn't try this case.
23 I'm just asking the Court's indulgence for just a bit before a
24 life sentence is imposed that we get the phone records from the
25 respective phone companies and that your Honor review in

EA7LFERS

Sentence

1 camera -- I'm not asking for it. I believe that the Court will
2 do what's appropriate. If your Honor wants a case, I'll find
3 one in the interim -- but I would like your Honor to just look
4 at the records that are apparently just these notes, so they
5 shouldn't be more than a few pages but probably in handwriting,
6 to see whether your Honor thinks there's anything in there that
7 should be turned over to the defense. That's all I'm asking
8 for.

9 THE COURT: I'm not going to order that because I
10 don't think the law requires the government to produce to the
11 judge for review that which is requested of the government by
12 defense counsel. Mr. Blanche is an honest, responsible, and
13 very effective assistant U.S. attorney. He has represented to
14 the Court that the government has produced all that was
15 required of the government to produce. He's reviewed the files
16 again in response to this motion, and he stands by that
17 representation. And the law does not require on the part of
18 the government to produce to me the records to see if I might
19 have the same or a different view of what the government is
20 obligated to produce. So the request for in camera review is
21 denied.

22 With respect to the other aspects of the motion, I
23 will file an opinion -- perhaps today, perhaps in a few days, I
24 hope by tomorrow though -- stating in a more fluid way my
25 reasons. But I deny the motion for a new trial. I've reviewed

EA7LFERS

Sentence

1 this motion previously, and I've concluded that there is no
2 merit to it in relationship to an obligation to give a new
3 trial because of an alleged failure on the part of the
4 government to produce Brady materials. Nothing I've seen in
5 the motion or heard today causes me to change the order that I
6 issued May 21, 2014.

7 MR. RAY: Your Honor, if I may just ask your Honor to,
8 on the denial, that it be without prejudice relative to the
9 phone records since my understanding is the defendant still has
10 the right, even in the event of an appeal, to make application
11 for a new trial based upon newly discovered evidence. I would
12 still like your Honor to rule on the question --

13 THE COURT: I'm not going to rule without prejudice.
14 I will rule effective on everything that's before me. If you
15 make another application, I will look at it afresh.

16 MR. RAY: My application I think can be stated now and
17 that is I would like the authority to issue a subpoena to the
18 two phone companies to actually get the records.

19 THE COURT: You'll have to make a motion.

20 MR. RAY: I can do that. Thank you.

21 I should be clear. That was included as part of my
22 motion which is to ask the Court for the issuance of a
23 subpoena. I can do so in more formal terms by actually
24 presenting to your Honor an actual subpoena to be so ordered,
25 but that's my application.

EA7LFERS

Sentence

1 THE COURT: I think there has to be a basis with
2 regard to opening up the trial record or on some other basis
3 that is authorized by law. Otherwise, there's no basis to
4 issue a subpoena. And since I rule against the opening of the
5 record under Rule 33(b), that's not the basis for issuing a new
6 subpoena.

7 MR. RAY: But I have a good faith basis to believe
8 that the records that were introduced at trial may be false. I
9 don't know how else I would be able.

10 THE COURT: You'll have to pursue whatever remedies
11 you have in a different way. As part of a Rule 33(b) motion, I
12 deny it.

13 MR. RAY: But I don't have another way, your Honor. I
14 have no way of getting -- I don't have subpoena power -- I have
15 no way of getting the records from the telephone companies.

16 THE COURT: That's exactly the point. I guess the
17 only other way is by a 2255 proceeding. And there is an
18 opportunity for discovery in a 2255 proceeding. It's subject
19 to court order. So it could be made then. But as part of a
20 Rule 33(b) motion, I deny it.

21 MR. RAY: Thank you, your Honor.

22 THE COURT: So where was I. I denied the motion based
23 on an alleged failure on the part of the government to satisfy
24 its obligations under Brady. I made that same ruling on
25 May 21, 2014. And, as I commented, nothing in the papers now

EA7LFERS

Sentence

1 presented or in the argument causes me to change my mind. I
2 don't know what Mr. Rivera may have said to the investigator.

3 There is no affidavit from the investigator, is there,
4 in the record?

5 MR. RAY: No, but the investigator is present in the
6 courtroom.

7 THE COURT: We're not taking testimony.

8 MR. RAY: Your Honor asked whether a record can be
9 made. The information was only obtained on Monday. Today is
10 Tuesday. And the investigator is present and available to
11 testify.

12 THE COURT: All right. I am not taking testimony
13 today in connection with a motion for a new trial.

14 And with regard to the other branch of the motion
15 having to do with impeaching by an allegedly newly discovered
16 piece of evidence, a phone record that was entered by
17 stipulation before and was there only for corroborative
18 purposes, I deny that as well. The new material is not
19 sufficiently cogent as impeaching material to cause me to
20 rethink the propriety of the verdict or the rationale for
21 granting a new trial. So the motion is denied. It will be
22 elaborated on in a written order.

23 And we'll now proceed to sentencing unless there's
24 something more to go into now. Anything more, Mr. Blanche,
25 before we get into sentencing?

EA7LFERS

Sentence

1 MR. BLANCHE: Not from the government.

2 THE COURT: Anything before we go into sentencing,
3 Mr. Ray?

4 MR. RAY: No. That completed the record on the motion
5 for a new trial.

6 THE COURT: With regard to sentencing, I have a
7 presentence investigative report from probation dated
8 October 3, 2014, that supplants all previous presentence
9 investigative reports, specifically those of September 22 and
10 September 17. And I have a sentencing memorandum from the
11 government.

12 Are there any other papers that I need to look at?

13 MR. BLANCHE: Not from the government.

14 THE COURT: Mr. Ray?

15 MR. RAY: No other papers, but we do have some
16 objections to the presentence report.

17 THE COURT: I will hear them. Before we start, I want
18 to make sure we're on the same ground.

19 MR. RAY: We are, yes.

20 THE COURT: Okay. So we go into sentencing.

21 Mr. Fernandez or Mr. Ray, has Mr. Fernandez read the
22 presentence investigative report dated October 3?

23 MR. RAY: He has, your Honor. We went over it
24 yesterday.

25 THE COURT: Would you prefer to answer for

EA7LFERS

Sentence

1 Mr. Fernandez? I'll allow it if you want it, but it's my
2 custom to ask Mr. Fernandez directly. But this is not a plea
3 situation. This is a trial situation. And if you want to
4 answer that question.

5 MR. RAY: Mr. Fernandez would prefer that I do. So
6 the answer is yes, that's acceptable.

7 THE COURT: He's read the presentence investigative
8 report?

9 MR. RAY: He has.

10 THE COURT: And he's had full communication with you
11 with regard to the report?

12 MR. RAY: In my presence, yes.

13 THE COURT: And you say you have some objections to
14 some of the factual information in the report?

15 MR. RAY: Yes, we do. And then there's also I believe
16 a legal question relative to what your Honor's sentencing
17 options are with regard to the respective counts.

18 THE COURT: Let's do the facts first.

19 MR. RAY: Okay.

20 THE COURT: Tell me your objections.

21 MR. RAY: Your Honor, I guess I have explained to my
22 client that the presentence report is not intended to be an
23 exhaustive recitation of the trial record. So that I think
24 some of these comments are perhaps best addressed in the
25 context that there's a trial record that either supports or

EA7LFERS

Sentence

1 doesn't support the information that is contained in the
2 presentence report, which is largely the government's version
3 of what happened.

4 THE COURT: No, it's probation's version.

5 MR. RAY: To be fair, that's correct.

6 THE COURT: And I think you've had opportunity to
7 submit to probation various comments that you made.

8 MR. RAY: And we did, yes.

9 THE COURT: So tell me your objections and I'll rule.

10 (Pause)

11 MR. RAY: Your Honor, in paragraphs 12 and 13, one of
12 the things that's addressed is the question of the payment
13 allegedly for the murder for hire, specifically as to how my
14 client was paid.

15 THE COURT: Let me read it first. Okay.

16 MR. RAY: My understanding from the government's
17 position at trial that it was Mr. Reyes who apparently was
18 paid, and according to the trial testimony from Reyes, in turn,
19 he was the one who paid supposedly Joe Fernandez and Luis
20 Rivera.

21 THE COURT: So Suero and Rodriguez-Mora were not paid?
22 I confess, I do not have a precise memory of the testimony at
23 trial. And this should be based on the trial record and not
24 what anyone remembers about the trial record.

25 MR. RAY: Right. And, look, I don't want to belabor

EA7LFERS

Sentence

1 the point because there's a trial record one way or the other.

2 THE COURT: I'll leave it open. I don't think it's
3 material in relationship to the sentencing --

4 MR. RAY: Agreed.

5 THE COURT: -- of Mr. Fernandez. If you would submit
6 to me postsentencing, within a week, say, what you think the
7 right way of expressing this would be, pass it through
8 Mr. Blanche.

9 MR. RAY: I will do so.

10 THE COURT: I will correct the statement here.

11 MR. RAY: And that's fine, your Honor. And I
12 apologize for not having done it sooner.

13 THE COURT: Mr. Ray.

14 MR. RAY: I know.

15 THE COURT: No need to apologize. You've done a
16 terrific job for your client. I wish every lawyer that I
17 experienced can do as good a job as you do. Did you hear what
18 I said?

19 MR. RAY: I did.

20 THE COURT: So don't apologize.

21 MR. RAY: We got the final on Friday.

22 THE COURT: Mr. Ray.

23 MR. RAY: And I reviewed it with him last night.

24 THE COURT: Mr. Ray, please don't apologize.

25 MR. RAY: I can represent to the Court, your Honor,

EA7LFERS

Sentence

1 that I don't have any other objections to factual information
2 in the report that I consider to be material to the question of
3 the sentence that your Honor would impose.

4 THE COURT: Can I give you a week then to supplement?

5 MR. RAY: Yes.

6 THE COURT: And pass it through Mr. Blanche.

7 MR. RAY: Yes.

8 THE COURT: And if you have disagreement, maybe in the
9 same letter you can highlight the agreements and disagreements
10 and I'll rule. This way I won't have letters going back and
11 forth. If you need a little more time, let me know it. I'll
12 hold up the judgment until we do that.

13 MR. RAY: Much appreciated. Thank you.

14 THE COURT: All right. So let's say a week from
15 Friday, okay. Submit it to me a week from Friday.

16 MR. RAY: Yes, your Honor, of course.

17 THE COURT: And this will be amending the factual
18 statements in the pretrial investigative report so that they
19 conform to the trial for the most part. If they have to go
20 beyond the trial, it should be indicated and discussed. All
21 right.

22 So I find the facts relevant to the sentencing of
23 Mr. Fernandez as stated in the presentence investigative report
24 correct, but subject to modification in connection with the
25 proceedings I've just identified. And I'll make the final

EA7LFERS

Sentence

1 finding after I review all the submissions.

2 Okay. So that takes us to the issue of what the
3 guidelines say. Is there a legal issue?

4 MR. RAY: Even one before that, your Honor, and I
5 don't want to belabor this.

6 THE COURT: Mr. Ray, make your points.

7 MR. RAY: I'm not trying to make trouble.

8 THE COURT: Serious business.

9 MR. RAY: Yes.

10 THE COURT: Make your points. I'm here to listen.
11 Take as much time as you need.

12 MR. RAY: On Count One, we agree that as the
13 consequence of the jury's verdict, the defendant is subject to
14 a mandatory life term of imprisonment.

15 On the second count, I'm confused and perplexed. I
16 see the government's argument at various points that because of
17 the fact that a gun was used in connection with what resulted
18 in murder, meaning the death of in this case two individuals,
19 that Mr. Fernandez should otherwise be subject to a mandatory
20 life term of imprisonment. The probation office, however, has
21 characterized the statutory penalties as from ten years to
22 life.

23 I have reviewed the statute, which we should probably
24 turn to if I may just have the Court's indulgence, but it's
25 924(j)(1), 18 U.S.C. Section 924(j)(1), and it says a person

EA7LFERS

Sentence

1 who --

2 THE COURT: Let me get it.

3 MR. RAY: Sure.

4 THE COURT: I have it.

5 MR. RAY: The lead-in language: A person who in the
6 course of a violation of subsection C, which is the ordinary
7 924(c) section which is use of a firearm in connection with a
8 crime of violence or a narcotics trafficking offense, causes
9 the death of a person through the use of a firearm shall, one,
10 if the killing is a murder as defined in Section 1111, be
11 punished by death or by imprisonment for any term of years or
12 for life.

13 And so when you read over all that and you try to
14 figure out what that means, I think you go to the definition of
15 1111. And if you flip over to that, that one is basically the
16 federal homicide statute which makes a distinction between
17 first degree murder and second degree murder. All first degree
18 murders are basically premeditated homicides, and everything
19 else that is not a first degree offense is a second degree
20 murder offense.

21 If I've read this correctly, if it's a first degree
22 murder, then that subjects one to a mandatory life term of
23 imprisonment. And Mr. Blanche will correct me if I'm wrong,
24 but my view of this, and which is why I'm confused, I think one
25 can only do that if there are sufficient Apprendi findings to

EA7LFERS

Sentence

1 support it, i.e., the jury would have to find by interrogatory
2 consistent with Apprendi that the murder was in fact a
3 premeditated murder, in addition to the findings that they made
4 that a gun was used and that death resulted.

5 So I guess I'm not sure, I couldn't tell from the
6 government's sentencing memorandum what their position is under
7 the statute relative to the penalty that applies under 924(j).

8 THE COURT: What do you think -- one minute,
9 Mr. Blanche -- what do you think I should do?

10 MR. RAY: I think what you should do is I don't think
11 there are Apprendi findings to support the imposition of a
12 mandatory life sentence on Count Two.

13 THE COURT: What was the verdict on that, do you
14 remember?

15 MR. BLANCHE: Just guilty.

16 THE COURT: Guilty.

17 MR. BLANCHE: There was no special -- your Honor, I
18 can deal with this very quickly.

19 THE COURT: Mr. Ray may not be finished.

20 MR. RAY: I'm finished. That's fine.

21 THE COURT: Okay, Mr. Blanche.

22 MR. BLANCHE: There is no mandatory life for 924(j)
23 ever.

24 THE COURT: Slow.

25 MR. BLANCHE: There is never a 924(j) sentence of

EA7LFERS

Sentence

1 mandatory life. 924(j), according to the statute, there's no
2 mandatory minimum at all, a maximum of life. However, a recent
3 Second Circuit case, actually, Supreme Court case addressing
4 Apprendi type issues has found that even though there's not a
5 ten-year mandatory minimum -- ten year, not life -- for 924(j)
6 in the statute, there is actually a ten-year mandatory minimum
7 associated with 924(j).

8 The reasoning behind that is because under Title 18,
9 United States Code, Section 924(c), if a firearm is discharged
10 during a crime of violence, then a mandatory minimum term of
11 imprisonment of ten years with a maximum of life must be
12 imposed. And so in order for a firearm to be used to kill
13 somebody, like here, it necessarily had to be discharged. So
14 there's a mandatory minimum term of imprisonment of ten years
15 on Count Two, a maximum of life, and the guidelines level is
16 life in prison.

17 So the result is that, the presentence investigation
18 report has it correct when it describes the potential
19 punishments which is for Count Two, it's a mandatory minimum of
20 ten years.

21 THE COURT: That's what the recommendation is of the
22 probation office.

23 MR. BLANCHE: The recommendation is for a life
24 sentence, but not mandatory life on Count Two.

25 THE COURT: But I'm looking at the discussion at the

EA7LFERS

Sentence

1 face page under Count Two, I'm told that the statutory sentence
2 is mandatory ten years to life.

3 MR. BLANCHE: Mandatory ten years to life.

4 THE COURT: And that comes from subsection C,
5 (c)(1)(A)(iii).

6 MR. BLANCHE: Correct.

7 THE COURT: Let Mr. Ray catch up.

8 MR. RAY: That clears up the confusion. I don't
9 disagree with that.

10 The only remaining issue on that point though is I'm
11 still confused about one other thing which is that the
12 probation office also indicated that the sentence with regard
13 to Count Two under the statute should be concurrent. And I'm
14 not sure that needs to be addressed because I'm not sure that's
15 right. In other words, my understanding of 924(c) in general
16 is that it is a consecutive term, whatever that term is. And
17 so I'm confused there too because I want to be sure we got that
18 one right.

19 THE COURT: I have to make a finding of concurrent or
20 consecutive, which I haven't done get.

21 MR. RAY: No, I understand. But my argument was, your
22 Honor, I just need to know whether it is mandatory that it be
23 consecutive under the statute.

24 THE COURT: Mr. Blanche.

25 MR. BLANCHE: It is mandatory that it be consecutive.

EA7LFERS

Sentence

1 So Count One carries a mandatory term of imprisonment of life.
2 Count Two carries a minimum of ten years in prison, a maximum
3 of life. But whatever sentence your Honor imposes on Count Two
4 must be consecutive to Count One.

5 THE COURT: That's my understanding as well.

6 MR. RAY: And that's my understanding of the law as
7 well, notwithstanding what's stated in the probation office's
8 report.

9 THE COURT: All right. So let me then move to finding
10 under the sentencing guidelines. And basically the guideline
11 for both counts is 43 and they are grouped. And because of
12 Section 3D1.4, two levels are added making the criminal offense
13 level 45. The guideline table doesn't go beyond 43, so I in
14 effect eliminate the grouping and consider the criminal offense
15 level under the guidelines and before 3553(a) evaluation as
16 calling for a life imprisonment.

17 Do you agree, Mr. Blanche?

18 MR. BLANCHE: Yes, your Honor. You can't go higher
19 than 43 anyway, so the government agrees, yes.

20 THE COURT: Mr. Ray.

21 MR. RAY: Your Honor, the only issue -- I don't
22 disagree with that. The only issue is apparently there was a
23 dispute, which I don't know has been resolved or maybe doesn't
24 need to be, between the government and the probation office
25 relative to whether the murders are grouped or they're not

EA7LFERS

Sentence

1 grouped and there was some misunderstanding as to what the
2 count of conviction was. And I just think that that should be
3 addressed and perhaps the government can clear that up.

4 MR. BLANCHE: Sure. With the final presentence report
5 that was issued on Friday, the government does not object.
6 There was some discussion. But the way it's described from
7 paragraphs 20 through paragraph 41 in the final presentence
8 report, the government agrees with that analysis.

9 THE COURT: That's my understanding as well.

10 MR. RAY: So we -- yes. I understand and accept the
11 calculation under the guidelines.

12 THE COURT: It comes to 45.

13 MR. RAY: That it calls for life imprisonment with
14 regard to Count One and life imprisonment with regard to Count
15 Two and that under the statute, those terms must run
16 consecutive to one another.

17 THE COURT: Thank you. What does it mean,
18 Mr. Blanche, to have consecutive life sentences?

19 MR. BLANCHE: Well, it matters from the standpoint of
20 if, for example, there's a later finding of a defect for Count
21 One, for example, and who knows what Congress will do or what
22 the Second Circuit will do in this case, but there could be
23 something that makes Count One fatal.

24 THE COURT: You would want me to, if I were to give
25 life under both, make them consecutive?

EA7LFERS

Sentence

1 MR. BLANCHE: Yes, your Honor.

2 THE COURT: Thank you.

3 The criminal history is IV. There are two criminal
4 history points for prior offenses, as indicated in paragraphs
5 55 and 58 of the guidelines; and another two levels under
6 Section 4A1.1(d) because at the time the instant offense was
7 committed, the defendant was on probation. That's stated in
8 paragraph 61 of the presentence investigative report.

9 So I will find from that subject to your correction
10 that there are four criminal history points placing
11 Mr. Fernandez in category III.

12 Do you agree, Mr. Blanche?

13 MR. BLANCHE: Yes, we do, your Honor.

14 THE COURT: Do you agree, Mr. Ray?

15 MR. RAY: Based upon what is presented in the
16 presentence report, yes. I mean, look, part of this is
17 somewhat academic if he's otherwise subject to a mandatory
18 sentence under the statute.

19 THE COURT: 3553(a) can be argued that way also in
20 terms of the fines and the sentencing guidelines.

21 But I'm required to find and I find that there are
22 four criminal history points, that Mr. Fernandez is in criminal
23 history category III. A net offense level of 45 and a criminal
24 history category of III makes him subject under the guidelines
25 to consecutive life sentences.

EA7LFERS

Sentence

1 Now we're at 3553 and I need to review with counsel
2 and with Mr. Fernandez, if he wishes to address me, what would
3 be a just punishment subject to mandatory minimum. Congress
4 gives me no discretion in terms of mandatory minimum, which is
5 life under Count One and a consecutive ten years to life under
6 Count Two.

7 Mr. Ray, I'll hear you. I note that Mr. Fernandez has
8 been detained for a day or two short of three years. He was
9 detained from October 8, 2011. He's 38 years old. He's a
10 United States citizen.

11 Mr. Ray.

12 MR. RAY: Your Honor, I'm not in the habit of making
13 arguments that don't make any difference. Your Honor correctly
14 indicated and I believe that there's a record to support it
15 that your Honor must impose now two consecutive life terms.

16 THE COURT: I'm not obligated on the second one for
17 consecutive life. I'm obligated ten years to life.

18 MR. RAY: Well, that's right. That's a guidelines
19 argument. In any event.

20 THE COURT: The idea now is that do I apply the
21 guidelines or do I apply something different.

22 MR. RAY: Well, obviously our position is that one
23 only has one life to give and it's already a life sentence on
24 the first count, which is the murder for hire statute.

25 I think that your Honor should know, if it's not

EA7LFERS

Sentence

1 apparently already, that my client maintains his innocence.
2 Again, I wasn't there and I don't know and he's struggled with
3 me mightily for a year to try to get me to do the sorts of
4 things that I have tried to do to find something, anything that
5 would suggest that there's something wrong with this jury's
6 verdict because they didn't receive all the information that
7 they could have received that might have established reasonable
8 doubt and his position which is that he didn't do this.

9 Now, I suppose that will be for another day now. Your
10 Honor has to respect the verdict. You've ruled on the new
11 trial motions that we've made. We will now proceed after
12 judgment to an appeal and ultimately perhaps the potential for
13 post judgment relief after a direct appeal has been pursued and
14 the mandate returns to this court in the event that the
15 conviction is affirmed.

16 One of the things I have learned is that from the
17 earliest stage, the first thing I did -- and your Honor may
18 recall this and I just offer this in connection with my
19 arguments relative to Count Two -- my client encouraged me to
20 assemble all of the 3500 material in this case, which I did.
21 It raised the legitimate question, well, why didn't he review
22 the 3500 material during the course of trial.

23 Well, since your Honor is a practical person, I will
24 just tell you that the 3500 material fits into more than three
25 three-ring binders, double-spaced, that I had to bring into the

EA7LFERS

Sentence

1 facility at the MCC over the course of the better part of two
2 weeks in spending more than 20 hours with my client reviewing
3 that 3500 material. And I offer this only for your Honor's
4 consideration perhaps for the future. The Court's ruling in
5 that regard was that at the government's request that the
6 material could not be shared with the defendant directly. It
7 could only be shared with the defendant in the presence of
8 counsel. It took me, I'll just tell you, it took me 20 hours
9 with Mr. Fernandez to review that material.

10 As a result of that, further investigation was pursued
11 over the course of a year. I'm not saying I spent every waking
12 moment doing it, but I'm telling you I spent probably on
13 average doing something relative to this case at least once
14 every two weeks for the past year trying to figure out if
15 there's something somewhere where I can get an opening to
16 suggest that there was something wrong with this verdict.
17 That's my client's position. He says that he didn't do it.

18 And to be honest with you, after having reviewed this
19 for a year, I don't know. And in most cases, you know, you
20 don't always know anything in life for a hundred percent
21 certainty, but I actually come at this now having spent a year
22 with it and I'm not sure either. I offer that for what it is
23 worth in mitigation relative to Count Two.

24 And, look, we'll have to do what we'll have to do on
25 appeal and elsewhere to see if there's anything that we can do

EA7LFERS

Sentence

1 recognizing, and as I've explained to Mr. Fernandez, the
2 finality of judgments and just how hard it is to open up a
3 jury's verdict. We thought we had an avenue to pursue relative
4 to Mr. Rivera. I have looked for other things in the 3500
5 material to try to figure out if something went wrong here.

6 And I'm not accusing anybody of anything. And just so
7 it's clear, I'm not assaulting in any way Mr. Blanche's
8 integrity or the prosecution team. I'm just trying to find out
9 what the truth is.

10 THE COURT: You're doing your job, Mr. Ray. You're
11 doing it very well.

12 MR. RAY: I'm trying to. Anyway, I don't want to push
13 the point. We've spent enough time.

14 THE COURT: Tell me about Mr. Fernandez as a person.

15 MR. RAY: Well, I've gotten to know him for this year
16 and his family.

17 THE COURT: Tell me about him.

18 MR. RAY: What you see is a person that has a loving
19 spouse, young children, got himself out of the neighborhood
20 into upstate New York, I think probably to avoid a lot of
21 problems. It's kind of a strange thing that supposedly, based
22 upon the trial testimony, he was somebody brought into this
23 because nobody would suspect that it was him. His position is
24 because it wasn't me. But it's rather a strange thing even by
25 the government's own witnesses.

EA7LFERS

Sentence

1 THE COURT: Was he working?

2 MR. RAY: The presentence report tries to put a
3 negative connotation that his employment history was,
4 quote/unquote, sporadic only because they weren't able to
5 verify it.

6 THE COURT: I ask you these questions because --

7 MR. RAY: But he was working.

8 THE COURT: -- when you're in a position of wanting to
9 challenge the jury verdict, you can't really open up. And it's
10 my job as the sentencing judge to try to understand the entire
11 person. And so I want to ask you these questions.

12 MR. RAY: This person comes from a loving family, a
13 wife that is perplexed, who comes to visit me in my office on
14 average about once a month or more. Young children. He's in
15 the community. He's taking care of a family. None of the rest
16 of this stuff really adds up. So that's the person that he is.

17 And, obviously, this is a strange occurrence given the
18 fact this is a homicide that apparently occurred in 2000. He
19 faced a trial, I'm sorry, an arrest 11 years later and a trial
20 13 years after the event. And now here we are in the 14th year
21 after the event to face what amounts to now the rest of his
22 life. He obviously treats this seriously. I have been
23 impressed based upon my --

24 THE COURT: When did he leave the Bronx?

25 MR. RAY: Not entirely certain, but approximately

EA7LFERS

Sentence

1 1998. It was clearly before 2000 is the point.

2 THE COURT: And he held a number of jobs in the area
3 of Monroe, New York, where he lived?

4 MR. RAY: Yes. And some, admittedly, are more
5 difficult to verify than others, but he was employed.

6 THE COURT: He earned a living?

7 MR. RAY: He earned a living, yes.

8 THE COURT: He has how many children?

9 MR. RAY: Four, your Honor.

10 THE COURT: And the age span?

11 Are you planning to address me, Mr. Fernandez? You
12 don't have to. But if you want to, I can get all this
13 information from you.

14 MR. RAY: Four, 12, and 15, your Honor.

15 THE COURT: Is Mr. Fernandez going to address me?

16 THE DEFENDANT: I have a letter that I'm going to read
17 to you after he's done.

18 MR. RAY: Yes.

19 THE COURT: You can do it now and you can just pick it
20 up if you want. You can sit down. You don't have to stand.

21 THE DEFENDANT: On October 18, 2012, my simple world
22 changed. The system I was raised to respect is being used
23 against me and my family. I am a tax paying, blue collar
24 worker with a wife, three daughters and one son. I have been
25 ripped away from my family and being falsely accused for a

EA7LFERS

Sentence

1 crime I did not commit.

2 I hire Murray Richman, a private attorney, who failed
3 to show the Court and the members of the jury my innocence
4 because of ineffective representation. He did not gather
5 evidence or witness to show the Court I am innocent of this
6 accusations. I was told lies after lies. Murray Richman told
7 me we will hire an investigator. He didn't. He said we have a
8 speedy trial. We didn't. We all know Mr. Murray Richman,
9 Brian Packett, and his firm failed to defend me. I witnessed
10 attorneys and the prosecutors plan vacations the summer before
11 my actual trial.

12 THE COURT: I missed that. Would you say that again?

13 THE DEFENDANT: I witnessed attorneys and the
14 prosecutors plan vacations the summer before my actual trial.
15 I did not go to trial until February 23, 2013. I surrender on
16 October 18, 2011, almost one year and a half later. I wasn't
17 granted my rights to a speedy trial. This allowed the
18 government more than enough time to find other cooperating
19 criminals to use against me in this case.

20 This trial was anything but fair. They all had a lot
21 to gain by creating an untrue story to elaborate Patrick
22 Darge's lies and the government's stories. Prosecutors not
23 only helped them fabricate these lies against me but also
24 encouraged this unjust, unlawful behavior knowing they are
25 lying by placing them fabricating these lies against me. But

EA7LFERS

Sentence

1 also encouraged them -- this is the same sentence, sorry -- to
2 stand.

3 I'm going to read it all over again, not the
4 beginning, but where I read it twice.

5 THE COURT: I've heard it.

6 THE DEFENDANT: The system is being manipulated to
7 help the criminals and imprison the innocent. Patrick Darge
8 should be a familiar name to the Court. Patrick Darge got
9 arrested in 2003. Patrick had a safety valve agreement. The
10 government wrote a 5K1 letter that you, Judge Alvin
11 Hellerstein, signed off on. Patrick did not tell the truth in
12 2003 or in 2010. He lied.

13 In 2010, Patrick Darge gets arrested for this case.
14 You were initially placed in this case. It was not a lottery,
15 as you stated during trial. His case came to you, Honorable
16 Judge Hellerstein. He confessed to the government about all
17 his crimes he committed and all the crimes he knows of for the
18 second time. He doesn't tell you about another murder he did
19 or about his brother, Alan Darge, or this crime until 2012,
20 which is a violation of the 5K1 agreement.

21 This is the same person you believe is credible and
22 find no reason to question his credibility. To collaborate his
23 lies, he used Yubel Mendez and his brother, Alan Darge, a/k/a
24 Boozer. Alan Darge -- Patrick and Alan Darge always worked as
25 a team doing their drug deals and helping each other conspire

EA7LFERS

Sentence

1 against the law and the government to maintain their freedom by
2 setting up others.

3 Alan Darge actually arrested in October, a year after
4 my surrender. They brought him in to testify against me and
5 released him soon after my trial. Alan Darge admitted on the
6 stand he shot four people and beat one guy up with a baseball
7 bat. He has been selling drugs since he was 14 years old and
8 continues to do so with the support of the government.

9 In 2012, Alan Darge got arrested. He had three
10 handguns that were recovered. Alan Darge also possessed 30
11 different firearms over the course of the conspiracy. And he
12 had one firearm that was burglarized from the home of a police
13 officer. He served less than one year time for all his crimes.
14 Alan Darge is now free on the streets capable to continue
15 selling drugs and hurting innocent people with his partner,
16 Christian Guzman.

17 Alan Darge used Christian Guzman, his right-hand man,
18 to collaborate his lies. Do you not see a pattern here, your
19 Honor. Alan Darge claims Christian Guzman called him and told
20 him I wanted to meet with him on October 13, 2011, the day in
21 question. The government shows Christian Guzman's phone record
22 with my number, my phone number, on the date in question, but
23 my lawyer, Murray Richman, filed to get my phone records.

24 I have been able to obtain and it shows Christian
25 Guzman's number is not on my phone records. How is that

EA7LFERS

Sentence

1 possible. Understand Murray Richman asked Alan Darge how did
2 you first hear about the murders. Alan said from Carlos
3 Correa. Alan state on the record Carlos told me who did the
4 murders. Carlos Correa, who on the record states he does not
5 know me or has never seen me.

6 The prosecutors asked Alan what did Joe Fernandez say
7 to you. Alan said Joe Fernandez told me Zac, a/k/a Alberto
8 Reyes, was the getaway driver. Alan said Zac drove Joe and my
9 brother Patrick to the place where the murders happened. Your
10 Honor, Alberto Reyes, a/k/a Zac, was on the stand when Murray
11 asked him do you know Joe Fernandez or do you see anybody in
12 the courtroom you recognize. He said no.

13 Yubel Mendez is another person used and trained by the
14 government to lie against me. Both Alan Darge and Mendez,
15 career criminals, were brought into the case later, after one
16 year, after my trial was postponed multiple times. They had no
17 charges related to this case. Yubel Mendez is the jail house
18 snitch who knew Patrick Darge before I surrendered and was
19 brought here to MCC.

20 I, Joe Fernandez, was initially placed with Patrick
21 Darge and Yubel Mendez when I arrived in MCC 5 North. Patrick
22 told the officer to put me in the same cell with Yubel Mendez,
23 which he states on the record. Your Honor, Patrick and Mendez
24 had already said their plan to set me up. Mendez states on the
25 record Patrick told me what Patrick did.

EA7LFERS

Sentence

1 Murray Richman asked Yubel Mendez when was the first
2 time you, Mendez, went to the government and told them about
3 the bucket you had. Yubel Mendez said, no, wait, I was not the
4 one who went to the government. They called him and asked him
5 about the bucket he had. They visit with Mendez more than 50
6 times to help him collaborate Patrick Darge fabricated story.
7 The government knew that Patrick was using Mendez to set me up
8 and the government did not care to honor the law they vowed to
9 protect.

10 Your Honor, if there is no Brady on the DD5 files or
11 on the statements that were made by all people involved in this
12 conspiracy, then why is the government fighting so hard not to
13 let us see it all. Your Honor, I would like for you to have an
14 in camera review of all the DD5 files and all the statements
15 that were made that we did not have access to before or during
16 the trial, like Luis Rivera and Aladino Suero, to see if there
17 is any Brady material.

18 Luis had the same charge I had and the government used
19 him throughout trial naming him the getaway driver and the gun
20 supplier. The government took him off the case and gave him a
21 low-level drug charge with minimal jail time. How does this
22 happen? Patrick Darge said on the stand he was the driver and
23 was the one that gave him the murder weapon.

24 My lawyer, Murray Richman, stated he could not
25 subpoena Luis Rivera because of legal issues. Patrick's story

EA7LFERS

Sentence

1 claims Luis Rivera was the guy who picked up Patrick and the
2 other shooter. Why can't we get the statements he said to the
3 government and why couldn't we get a subpoena before trial? I
4 have witnessed the government used the legal system in their
5 favor.

6 We also have Aladino Suero, who was the guy who called
7 his boss, Jeffrey Minaya, and said he has the two shooters to
8 kill the Mexicans. Aladino told Jeffrey Minaya the two
9 shooters are Patrick and Tilo. The government encouraged
10 Aladino to take a deal and plead the Fifth. This is another
11 person whose statements are being hidden by the government.

12 Your Honor, I ask if there is nothing in all of the
13 statements, then why won't the government let us read them.

14 On March 7, 2013, I was convicted for a crime I did
15 not commit and I am not a murderer. I was framed and set up by
16 Patrick Darge, the government, and multiple people I am
17 supposed to call family and a person I never knew nor shared
18 anything with.

19 My true family, my wife, my children, and all who
20 truly know me know that I am innocent. I pray every day for
21 strength from my Lord to help me bear this pain of such an
22 unjust system full of betrayal and corruption. My family and I
23 will continue to fight to clear my name and I will keep hope
24 and faith and I will never stop fighting this wicked system. I
25 will overcome in God I trust.

EA7LFERS

Sentence

1 Thank you for listening to me and for your time.

2 THE COURT: Mr. Fernandez, in addition to maintaining
3 your innocence and explaining your version of what went on, is
4 there anything you want to tell me about yourself that I should
5 take into consideration in sentencing you? You should
6 appreciate that I'm sentencing you pursuant to the jury
7 verdict. As a judge, it's my job to carry out the law. And
8 the law, as I believe I have this power when I sentence people,
9 I need to take into consideration who they are and what they
10 do, what's their family situation. Anything you want to tell
11 me, I'd like to listen.

12 THE DEFENDANT: I mean I pretty much said everything.
13 I always worked all my life. I never had no associate with
14 none of these guys that were involved in this crime. I am an
15 honest person, a father. I always took care of my family. I
16 never sold drugs, never murdered no one, never been with none
17 of these guys, as you know. I mean I pretty much covered it.

18 THE COURT: Thank you.

19 Anything more you want to say, Mr. Ray?

20 MR. RAY: No, your Honor. Thank you.

21 THE COURT: Mr. Blanche.

22 MR. BLANCHE: Not unless the Court has any questions.

23 THE COURT: I don't have any questions.

24 MR. BLANCHE: Nothing to add, your Honor.

25 THE COURT: Mr. Ray, on the second consecutive count,

EA7LFERS

Sentence

1 which authorizes me to sentence Mr. Fernandez from ten years to
2 life, do you have a recommendation?

3 MR. RAY: Your Honor, my recommendation is that ten
4 years is more than sufficient given what is already a reality
5 which is the life count on Count One.

6 THE COURT: Mr. Blanche, do you have a recommendation?

7 MR. BLANCHE: Yes, your Honor. The law requires that
8 your Honor sentence him irrespective of the mandatory minimum
9 for Count One. And we would respectfully request the Court
10 impose a sentence of life in prison on Count Two for all the
11 reasons discussed in our sentencing memorandum and the trial in
12 this case.

13 THE COURT: I'll come back in a moment.

14 (Recess)

15 THE COURT: Mr. Fernandez, when a sentencing hearing
16 comes on, it's not usual to review what happened at trial. The
17 judge takes the verdict as it was given, listens to the
18 characteristics of a person, of a defendant, in terms of who he
19 is and what his family is like, what kind of work he did, and
20 whether he had criminal history or not and to what extent, and
21 the offense as proved at trial.

22 I allowed you to read, without interrupting you, your
23 entire statement. I have respect for you. I believe very
24 strongly that every person is entitled to the same full
25 respect. And so that's what you wanted to do, I let you do it.

EA7LFERS

Sentence

1 In sentencing you, however, I assume that the verdict
2 was correct. Everything you say could be true. We don't
3 require absolute certainty for a jury to give a verdict in a
4 criminal case. The standard is beyond a reasonable doubt. In
5 my opinion, given the record, and that's all I know is the
6 record, the jury's verdict was beyond a reasonable doubt. And
7 there is no reason in law, in my opinion, for me to accept the
8 jury verdict and change it. That's why I ruled the way I ruled
9 with regard to your motion and Mr. Ray's motion.

10 No judge is infallible. You're going to appeal, I'm
11 sure. And it may be that the Court of Appeals will see things
12 more towards your way of looking than the way I looked at it.
13 That happens and that's part of our system. But I have to
14 assume that what the jury found is what existed and, therefore,
15 what existed were murders of two people. And I have to punish
16 you under the law.

17 So for the first count, the count alleging conspiracy
18 to use interstate commerce facilities in the commission of
19 murder for hire, there's a mandatory life imprisonment I'm
20 required to administer and I so sentence you.

21 In the second count, use of a firearm in furtherance
22 of a crime of violence with death resulting, the range is ten
23 years to life. But since death resulted and to be consistent
24 with the first count and to recognize that two people's lives
25 who deserve to live were killed in what was found to be in cold

EA7LFERS

Sentence

1 blood, a life sentence is also appropriate.

2 And so I sentence you to consecutive life sentences.

3 The law provides for a term of supervised release
4 beyond that. And I don't know if this is purely academic or
5 what, but I'll sentence you to five years of supervised release
6 to follow.

7 There are various recommendations set out in page 19
8 and following of the presentence investigative report. I order
9 the mandatory conditions at the bottom of page 19.

10 I find that you pose a low risk of substance abuse. I
11 do not impose mandatory drug testing.

12 The 13 standard conditions of supervision are imposed.

13 The condition for search on page 20 is imposed.

14 The condition to report to the nearest probation
15 office within 72 hours of release from custody is imposed, and
16 you'll be supervised by the district your residence.

17 There's a mandatory special assessment required under
18 the law of \$200 and that is imposed.

19 I am not imposing a fine. There's no ability to pay a
20 fine.

21 Restitution is not appropriate in this case.

22 And you're in detention so you'll be remanded.

23 Before I notify you of your right to appeal, have I
24 missed anything, Mr. Blanche?

25 MR. BLANCHE: Your Honor, the government moves to

EA7LFERS

Sentence

1 dismiss.

2 THE COURT: Not yet.

3 MR. BLANCHE: Sorry.

4 THE COURT: Have I missed anything so far?

5 MR. BLANCHE: No, you did not, your Honor.

6 THE COURT: Mr. Ray?

7 MR. RAY: Just one thing, your Honor, for a
8 recommendation regarding designation.

9 THE COURT: Yes.

10 MR. RAY: As you know, with regard to his residence,
11 the most convenient facility would be Otisville. I don't know
12 whether that will be the designated facility or not.

13 THE COURT: I'll recommend a facility as proximate as
14 possible to what's Monroe's county?

15 MR. RAY: Orange County.

16 THE COURT: Proximate as possible to Orange County.

17 MR. RAY: Thank you. That's sufficient.

18 THE COURT: I advise you, Mr. Fernandez, that under
19 the Constitution, you have a right to appeal. If you can't
20 afford a lawyer, a lawyer will be provided free of charge under
21 the Criminal Justice Act. You should discuss with Mr. Ray
22 whether or not you wish to appeal.

23 And if your client wishes you to appeal, I instruct
24 you, Mr. Ray, to do so on a timely basis.

25 MR. RAY: I will do so following the issuance of the

EA7LFERS

Sentence

1 judgment. Thank you.

2 THE COURT: I'm going to hold up the judgment until I
3 get the submission on the findings. Since you'll appeal after
4 that, the sooner you do it, I'll act on it as promptly as I
5 can.

6 MR. RAY: Understood. Thank you, Judge.

7 THE COURT: Underlying counts?

8 MR. BLANCHE: Yes, your Honor. The government moves
9 to dismiss the underlying counts against the defendant.

10 THE COURT: Without objection, Mr. Ray?

11 MR. RAY: No objection, your Honor.

12 THE COURT: Granted.

13 I suspect that you were expecting this, Mr. Fernandez,
14 given what the situation is. You have a difficult story to
15 deal with. You've got a fantastic lawyer, and I'm sure you'll
16 do what you need to do. I wish you luck.

17 Thank you. We're in recess.

18 o0o